IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 305

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

NEW ENGLAND ELECTRIC SYSTEM ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATUTES INVOLVED

This case involves Sections 2(a)(29)(B), 11(b)(1) and 24(a) of the Public Utility Holding Company Act of 1935 (the "Holding Company Act") and Sections 557 and 706 of Title 5 of the United States Code (the Administrative Procedure Act as codified). The sections involved are set forth in Appendix A to this brief.

QUESTION PRESENTED FOR REVIEW

The Respondents[1] submit that the basic question presented goes to the fundamentals of administrative law and procedure, and is properly stated as follows:

> Did the Court of Appeals err in deciding, on the basis of the record as a whole and after a fresh review of it, that the Commission's Findings and Opinion does not reveal the thorough examination and evaluation of the evidence and the careful application of expertise properly required of the Commission, and in remanding the case to the Commission for further proceedings?

The "basic question" stated by the Petitioner (Br. 2)[2]—whether the court below misapprehended the standard laid down by this Court for interpreting the "substantial economies" test under Section 11(b)(1)(A) of the Holding Company Act, and improperly shifted the burden of proof from the holding company to the Commission—is not raised by the record.

The Petitioner in no way questions the standard of "serious impairment" as stated by this Court and the court below, and there is now no definitional dispute. As to the application of this standard and the burden of proof, the court below explicitly stated that the holding company has the burden of proving loss of substantial economies under a stringent standard (A. 52)[2]; and nothing in its opinion even suggests that the burden of proof should be shifted from the holding company to the Commission.

The Petitioner also states three subsidiary "specific questions" as facets of the "basic" question (Br. 2-3). The

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[1] The Respondents are New England Electric System ("NEES") and subsidiaries (collectively, the "NEES System").

[2] In this brief, "Br." refers to Petitioner's Brief, "A." refers to the Appendix to the Briefs, and "R." refers to the transcript of record in SEC v. New England Elec. Sys., 384 U.S. 176 (1966) (October Term, 1965 No. 636).

first specific question assumes the answer when it states that the Commission found "serious deficiencies" in Respondents' study of the added costs of independent operation and so, impliedly, was entitled to reject the study in its entirety (Br. 2-3).

The Petitioner's second specific question is based on the assumption that the Commission found "that the separated [gas] system would have an adequate margin of revenue over costs for successful independent operation"; and suggests that the court improperly required the Commission to make "a specific determination as to the system's future rate of return" (Br. 3). The Commission did not make the assumed finding, and the court did not require the specified determination.

The Petitioner's third specific question is whether the Commission in deciding whether a loss of substantial economies will occur may consider offsetting advantages of independent operation without attempting to fix a specific dollar value therefor (Br. 3). The Petitioner implies that the court below answered this question in the negative and thus imposed a requirement impossible to comply with (Br. 3). What the court actually decided is something quite different. (See p. 33 below.)

STATEMENT OF THE CASE

The Petitioner's "Statement" (Br. 4-10), so far as it pertains to the description of the NEES System and the historical facts of the case, is acceptable, but in other respects it reflects omissions, errors and unsupported assumptions, some of the more significant of which are the following:

1. The Statement omits the crucial holding of the court below, based on its review of the entire record, as to the

quality of the Commission's analysis of the evidence and its use of expertise in this case:

> "Even without the burden of proving likely demise,[3] petitioner's [NEES'] burden is, as the Court said, to meet 'a much more stringent test' than that of a probable significant loss. But, if the standard to be applied to petitioner is stringent, so is the level of analysis and expertise to be exercised by the Commission. We have, only after a fresh review of all the evidence in the light of this most stringent practical standard,[4] concluded that the Commission's opinion does not reveal that application of both reason and experience to facts which merits endorsement as the responsible exercise of expertise." (A. 52).

2. The Statement does not mention the important fact that, as the only basis for its finding that annual losses from severance of $1,098,600 are not "substantial", the Commission relied on a comparison with ratios in prior divestment cases (A. 16). The Commission made no analysis whatever of the relevance of the ratios nor of how the losses would affect the NEES gas companies. The Commission's rejection of the contentions of Respondents and the Massachusetts Department of Public Utilities (the "DPU") that the circumstances surrounding the NEES companies were

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[3] After this Court's decision in SEC v. New England Elec. Sys., *supra* note 2, the Commission on further hearing before the Court of Appeals indicated that it understood that the test of "loss of substantial economics" would be met only if the separated system would be "unable to stand by itself" (A. 51, 65). The court below carefully analyzed and then rejected this position, stating that a test based on mere ability to survive would read out of the Holding Company Act the phrase "without the loss of substantial economies", and would distort this Court's approval of the words "serious impairment" (A. 51-52). The Petitioner does not now take issue with that conclusion and apparently has withdrawn from the position it took before the court below. (See Br. 2, 11.)

[4] The words "most stringent" are italicized in the reproduction of the court's opinion in the Appendix (A. 52) but are not italicized in the report. See 376 F.2d at 111.

different was based solely on comparison with other Massachusetts operating companies (A. 17-18). The validity of the ultimate findings and the divestment order thus depend on the comparability of the companies compared and of their circumstances. There was substantial evidence of significant differences between the NEES gas companies and the other Massachusetts companies (R. 231-32, 591, 936-39), and no evidence of comparability, other than the fact that the other companies do business in Massachusetts. The Findings and Opinion, however, discloses no examination by the Commission of this crucial question.

3. Notwithstanding positive evidence to the contrary, including even one case of business failure (R. 591), the Findings and Opinion and the Statement in Petitioner's Brief seem to imply and proceed on the assumption that the other Massachusetts gas companies are independent and are operating profitably and successfully (A. 17, Br. 9). There is no finding to that effect and no evidence on which such a finding could be made. The numerous references in the Petitioner's Brief to such a finding (without record citations) (Br. 9, 10, 31, 33) emphasize its importance and underscore the seriousness of this deficiency in the Findings and Opinion.

4. The Petitioner's Brief and the Findings and Opinion refer to twelve nonaffiliated or independent Massachusetts gas companies "which respondents selected during the proceedings for comparison", and very clearly this alleged selection of twelve companies is the justification now advanced by the Petitioner for the Commission's reliance on statistics relating to those companies with no effort to determine their meaning or comparability. (See Br. 5-6, A. 18, 20.) The reference is not warranted. These twelve are gas companies or gas departments of combination gas and electric companies which operate in Massachusetts and have

over 5,000 customer meters (Res. Ex. 90; R. 656, R. Vol. III p. 1365).[5] An Ebasco witness testified that he had compared NEES' commercial cost figures per customer with others as a statistical check (R. 531). On cross-examination he refreshed his memory as to the names of the companies by reference to a working paper, and at the request of the Commission's counsel the working paper was subsequently put into the record (R. 557-61, 656). This was the entire extent of Respondents' alleged selection.

5. The Statement contains no reference to the fact that the Massachusetts Department of Public Utilities, which has jurisdiction over and regulates both gas and electric companies in Massachusetts, including all of the NEES gas companies, intervened as a party in the proceedings before the Commission and strongly opposed divestment of the gas companies. The Chairman of the DPU testified at length to the effect that in Massachusetts joint ownership or operation of gas and electric utilities is in no way contrary to public policy, that each case depends on its own circumstances, that 16 of 26 gas companies in Massachusetts (including NEES') are either combination gas and electric companies or under common control with electric companies, and that in the case of the NEES System there had been no suppression of one business in favor of the other. The view of the DPU was that divestment would be adverse to the interests of the residents of Massachusetts, and might necessitate increased gas rates; that it would not achieve any benefits but would result in the impairment of service and the loss of substantial economies; and that the

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[5] "R. Vol." refers to Volume III, IV, V or VI of the transcript of record in SEC v. New England Elec. Sys., *supra* note 2 (October Term, 1965 No. 636). These volumes contain the exhibits in the case including, in Volumes IV, V and VI, the Ebasco Report. (See Res. Ex. 58A, 58B, 91; R. 131, 564.)

loss would fall ultimately on the consumers (R. 41-42, 581-82, 587-94).

6. The Petitioner's Brief incorrectly states that Ebasco originally prepared its study on one theory and then "attempted to readjust its study" to a different theory and implies that this "changed basis" distorts the results (Br. 22-23). There was no change of theory and no readjustment. A brief reference to the proceedings before the Commission will clarify this.

The Commission's original order of notice initiating the proceedings specified *inter alia* three issues which appear relevant to this point (R. 20; see also R. 40-41):

> (a) whether the System's electric properties constitute a single integrated system;
>
> (b) whether the System's gas properties constitute a single integrated system; and
>
> (c) whether both the electric and the gas properties may be retained in a single holding company system.

On the first issue, after extensive hearings, the Commission in its detailed Findings and Opinion concluded that the electric properties constitute a single integrated system (R. 27-38).[6]

When hearings were resumed, Respondents presented a detailed study summarized in the Ebasco Report, including pro forma operating statements of the gas companies, both individually and as a system, and a comparison of the two to determine whether operation as a single system would effectuate "substantial economies" and whether, subject to the applicable limitations of area and size, the gas companies could accordingly be treated as a single integrated system as defined in Section 2(a)(29)(B) of the Holding

[6] New England Elec. Sys., 38 S.E.C. 193 (1958).

Company Act. Since the Commission had not determined that question, it was necessary to compare operation of the gas companies as part of the NEES System with their operation both individually and as an integrated gas system separate from the NEES System. In his opening statement before the presentation of any evidence, Respondents' counsel explained the procedure and the order in which the evidence would be presented (R. 53-55), and that order was followed. The first witness also gave a description of the evidence as it was subsequently presented (R. 89-92). There was no readjustment or changed basis of the study.

7. The Commission in its Findings and Opinion must have relied on the Ebasco Report (the study submitted by Respondents referred to above) to support its concession that as Respondents contended the NEES gas companies operating together can effectuate "substantial economies" and thus constitute an integrated gas utility system within the meaning of Section 2(a)(29)(B) of the Holding Company Act (A. 3). Yet in determining the question whether the same NEES gas companies could be retained by NEES under Section 11(b)(1)(A) of the Holding Company Act, the Commission rejected the entire Report as unreliable (A. 14, 24). At no time has the Commission explained this inconsistent treatment of the Report.

8. The Petitioner's Brief states that NEES asserted its claim "under the exception provided by Clause (A) of Section 11(b)(1) which permits retention . . ." (Br. 4, 7). Clause (A) is not an exception, but is, along with Clauses (B) and (C), one of three conditions of the exception made by the proviso in Section 11(b)(1). This distinction is significant because later in its Brief the Petitioner attempts to reopen under Clause (A) the size requirement contained in Clause (C) (Br. 6, 31-33), as to which the Commission had specifically found that the requirement is satisfied (A. 7).

SUMMARY OF ARGUMENT

If Respondents correctly understand the Petitioner's Brief, its main thrust is that studies and estimates made by experts, however competent, involve so many judgments and predictions that they are unreliable and of relatively little significance (Br. 19-21); that final judgment must be made by the Commission by application of its own general experience and expertise without particular reference to the individual circumstances of the instant case (Br. 26); that in making this judgment (after giving effect to the policy of the Act favoring competition by adopting a most stringent standard), the Commission may give such further weight to the assumed general benefits of competition as it thinks proper without any attempt to identify or evaluate specific benefits and in spite of uncontroverted evidence that in the particular case there will be no such benefits (Br. 35-36); and finally that its ultimate determination is for all practical purposes beyond judicial review (Br. 17).

Respondents take a fundamentally different approach. They do not question the Commission's broad expertise nor the importance of consistency in administrative practice, but they do question the ability of any commission with jurisdiction over such a wide and varied range of business activities to have such specific and detailed knowledge and expertise that it can properly rely thereon and reject in its entirety an imposing body of factual and expert opinion evidence such as was presented in this case.

Respondents suggest that highly specialized experts working in a narrow technical field may have greater expertise in that field and more intimate knowledge of the relevant facts than the Commission can have. They contend that the very purpose of the administrative process and the nature and scope of the responsibility delegated to the Commission impose on it the duty to deal with each case individually

on its own merits, to examine the facts of each case with meticulous care, to weigh the evidence in the light of its expertise and not attempt to substitute its expertise for the evidence, to accord to expert testimony the credence and weight to which the qualifications of the particular expert entitle it, to draw on the experience of other cases with care and to rely on precedents only after satisfying itself that the circumstances are comparable, and finally in its Findings and Opinion to set forth affirmatively all subsidiary findings necessary to support its ultimate conclusion, together with an adequate statement of its reasons and explanation of any apparent inconsistencies or departures from established principles, all in form to facilitate meaningful judicial review. Any relaxation of this standard of administrative performance would be a dangerous precedent.

Respondents' basic contention is that the Commission has not adequately addressed its attention and applied its expertise to the specific circumstances of this case, but has reached its conclusion wholly on the basis of the apparent similarity between certain mathematical ratios in this case and those in other cases (which the Commission has erroneously assumed were decided on the basis of those ratios), without examining or explaining the relevance of the cited ratios to the test of "serious impairment", and without taking into account differences in the circumstances which render the comparison irrelevant (A. 17).

More specifically, Respondents contend that neither of the reasons given by the Commission in support of its divestment order (A. 14, 17), namely, the alleged unreliability of the Ebasco Report and the finding that annual losses of $1,098,600 are not "substantial," is valid.

Respondents spared neither time nor money in making the Ebasco Report accurate and reliable. The work was done by leading experts in the field. Every aspect of it

was tested out in searching cross-examination. In the end, only two relatively small items were challenged, not on the basis of a claim of mistakes, but on the basis of a difference of opinion among experts (A. 13, 14). Even if valid, these would cast no shadow on the remainder of the report and would still leave losses of approximately $1,000,000 per year (A. 43-44). Further, in "conceding" that the gas companies are a single integrated system under Section 2(a)(29)(B), the Commission implicitly recognized the reliability of the Report (A. 3).

In holding that the loss of $1,098,600 would not be substantial, the Commission considered only the *size* of the loss ratios and declined to consider the *effect* of the losses on the future health and operations of the system. In brief, it acted by rule of thumb and refused to examine specific circumstances and apply its expertise to them.

The Petitioner's claim, asserted in its Brief but not mentioned in the Commission's Findings and Opinion, that estimates and pro forma statements are too speculative to be useful, is inconsistent with the Commission's regularly followed practice of requiring and relying on such studies and with its action in this case in resting its divestment order on a comparison of figures derived from just such studies in this and other cases (A. 16, 28).

Adoption of the "most stringent test" of substantial economies gives full effect to the policy of the Act in favor of separation. To allow unrestricted further use of this factor as an unlimited offset to proven losses would, as a practical matter, nullify judicial review.

The crucial determinations in this case depend so much on the particular facts and the character of the evidence relating to those facts that they can be adequately reviewed only in the light of a detailed examination of the whole record. This refers particularly to the determination of such issues as the reliability of the Ebasco Report, the validity

of the Commission's criticisms of certain aspects of the Report, the adequacy of the consideration accorded the views of the Massachusetts Department of Public Utilities and the testimony of its chairman, the significance of conditions peculiar to the NEES gas companies, the relevance of specific precedents and comparisons with other systems, and finally the significance of the demonstrable errors, omissions and inconsistencies in the Commission's Findings and Opinion. The court below has made such a complete examination of the record, and its decision should be affirmed.

ARGUMENT

Introduction

Respondents agree with a major part of Petitioner's Brief. They recognize that retention of an "additional system" represents a narrow exception to the general policy of the Act, that they have the burden of affirmatively bringing themselves within this exception, and that under the definition of "substantial economies" approved by the Supreme Court the test is stringent and their burden is a heavy one. They do not claim that the Commission has any duty to adduce evidence or remedy defects in their case and they recognize that within limits it is entitled to rely on its own experience and expertise.

Conversely, however, they contend that the Commission must direct its attention and apply its expertise to the specific facts of the individual case as established by the evidence and base its decision on those facts, and in this connection that it must apply its expertise specifically to analysis and prediction of the *effect* of anticipated losses on the future health and operations of the divested system.

Respondents submit that within these principles, on the record in this case, the Commission's performance has fallen short of an acceptable standard.

More specifically, Respondents contend that the Commission has failed to come seriously to grips with this case and has not given it the careful, individual attention which it requires, but has undertaken to dispose of it on the basis of general assumptions and precedents, and that this in turn has resulted in its improperly rejecting the Ebasco Report, ignoring the testimony and advice of the Chairman of the Massachusetts Department of Public Utilities, underestimating the handicaps under which the divested gas companies would operate, and finally holding that the loss of economies that would be sustained is not substantial. These deficiencies are aggravated by the absence of essential subsidiary findings and explanation.

1. THE COMMISSION IMPROPERLY REJECTED THE EBASCO REPORT.

The Ebasco Report is a three volume document summarizing in more than 500 pages of text and figures the results of a study made by Ebasco Services, Inc. in 1959-60. It analyzes in depth the existing operations of the NEES System and reports in detail on the feasibility and the effects of separating the eight NEES gas companies from the NEES System.[7] The Commission in its Findings and Opinion rejected the entire Ebasco Report; it held that no severance losses were proved (A. 14, 24).

The court below reviewed all the evidence, and flatly disagreed with the Commission: "the record here demonstrates *conclusively*", the court said, "that *some* increased costs are inevitable — the only doubt possible concerns the amount." (A. 54. Emphasis added.) That being so, the court said, the Commission could not order divestment without applying its expert judgment on the basis of some figure acceptable to the Commission (A. 54). Moreover, the court

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[7] R. Vol. IV-VI. See note 5 at page 6.

pointed out, the Commission's reasons for rejection were based on errors and inconsistencies or went to minor points only; even if accepted, they left no doubt that a large residual showing was made by the Ebasco Report, and that significant severance losses are involved (A. 42-44).

The Petitioner now introduces in its Brief two theories not mentioned in the Commission's Findings and Opinion to support its rejection. First, the Petitioner suggests, the study is suspect as a readjustment made to meet new Commission requirements and, impliedly, to provide an unwarranted opportunity for the exercise of judgment by Respondents or Ebasco or both (Br. 22-23). Second, Petitioner urges that the Commission should have unlimited power to reject the Report because it is based on pro forma figures and projections (Br. 25-27). Petitioner's first theory has no basis in fact and is inconsistent with the record. (See pp. 7-8 above.) The second theory, an unlimited power of rejection, has no sound basis in law and is little more than a request by the Commission for *carte blanche* from the Court.

The quality of the Ebasco Report, the deficiencies of the Commission's analysis of it and the reasoning of the court below are the relevant factors. They clearly demonstrate the need for further examination and analysis on the part of the Commission, and so they clearly support the order of the court remanding the case to the Commission for that purpose.

A. The Ebasco Report is a carefully prepared and reliable document which conclusively demonstrated significant losses.

Ebasco Services, Inc. is an independent utility engineering and consulting firm of wide experience and outstanding qualifications (R. 89, 96-100). The Commission in no way questions Ebasco's expertise and indeed recognizes its "ex-

tensive experience in the utilities field." (A. 10) A task force of Ebasco experts and the personnel working under their direct supervision spent more than 4,500 man-hours over a period of twelve months in the preparation of the Ebasco Report prior to commencement of the hearings (R. 100-06, 563-67, 667-68). The five Ebasco experts and six NEES System executives (including the President and the Treasurer of NEES and the head of the NEES Gas Division) testified in detail at lengthy hearings and were exhaustively cross-examined by counsel for the Commission's staff. All explanatory and supplementary data requested by the Commisssion's staff was supplied. The witnesses' expertise and detailed familiarity with the facts were clearly demonstrated.

The Ebasco Report and Respondents' related testimony and exhibits showed that, based on their 1958 operations, the eight NEES gas companies would incur measurable annual net operating losses of at least $1,495,000 if severed from the NEES System and operated as eight separate companies, but that $329,400 of these annual losses could be eliminated if after severance the gas companies were allowed to operate as a single system. A change in service company charges subsequently authorized would have reduced the loss by $67,000. The Ebasco Report, adjusted to reflect this change, thus showed a minimum annual loss of economies in the amount of $1,098,600 if the gas companies were operated together as a single independent system.

The Ebasco Report and the related evidence are the most extensive and thorough study of the consequences of holding company control and the prospective effect of severance that has ever been reported in a Section 11(b)(1) case. The court below has twice carefully reviewed all of this evidence and has concluded that on severance increased costs are inevitable (A. 54), and that even accepting all of the Commission's criticisms, "there is a large, residual showing in the Ebasco report." (A. 44) Significantly, even

the Commission has relied on the Report and the related testimony. It had no other basis for concluding that the NEES gas companies are a single integrated system, and it conceded that point (A. 3).

B. Finding merely that the specific amount of losses claimed by Respondents has not been established, even if valid, would not dispose of the case.

The Petitioner does not now challenge the holding of the court below that the record conclusively shows that increased costs are inevitable. It only argues that "even conclusive proof of some increased costs does not begin to meet [Respondents'] burden." (Br. 18)

But if it is undeniable that an increase in costs will occur, the Commission cannot be permitted to ignore that fact, even though as the Petitioner notes, the Respondents must meet "the burden of establishing an exception", and even though Congress anticipated that severance would usually cause some loss (Br. 18). In a case of this kind, the Commission must either determine an amount which it would regard as substantial and measure Respondents' case against that amount, or determine the amount proved by the Respondents and consider whether it is substantial. Comparing an undetermined amount of loss with an undefined standard of substantiality is too vague and indefinite to be useful.

As the court below noted, "if the Commission is to use its expertise to assess the impact of the costs in 'the total competitive situation', it must attempt to determine some acceptable figure as a predicate for its assessment." (A. 54) A determination that $1,098,600 has not been proved, without determining, for example, whether $1,088,600 has been proved, and if proved is substantial, does not dispose of the case. The Commission's rejection of the Ebasco Report with no assessment of the amount of losses proved would be

significant only in conjunction with a finding that *anything* less than $1,098,600 is not substantial. It cannot provide a separate basis for an order of divestment.

C. The Commission's reasons for rejection of the Ebasco Report were not valid.

In its Findings and Opinion the Commission stated two reasons for its rejection of the Ebasco Report: first, "Ebasco's failure to consider employment of combined billing" by the gas companies after severance; and second, Ebasco's "inadequately explained disparate treatment of certain effects of severance on the gas and electric companies, respectively," in two Massachusetts communities where NEES provides gas and electric service (A. 14). These criticisms were both based on mistakes of fact and on invalid assumptions, and were inconsistent with the record. They are, moreover, in the aggregate, of minimal significance.[8]

As to the first criticism, relating to combined (or, more properly, centralized[9]) billing by the NEES gas companies

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[8] Petitioner also states in its Brief that the Commission found the estimated additional salaries and/or positions for the top executive staff of the gas system were suspect (Br. 24). Petitioner relies for this entirely on the court below (A. 53-54); the Respondents do not find the statement anywhere in the Commission's Findings and Opinion.

[9] Centralized billing would involve a billing center for the gas companies (with additional costs of transportation and communication and loss of part-time work in the smaller companies) which Ebasco considered marginal at best in view of the relatively small operation which could not justify a computerized operation (R. 898-902, 906-09). Combined billing would involve combining gas and electric billing operations as was done in NEES at six different locations (R. 528-29, 897). The Petitioner seems to suggest in its Brief that this still might be done after severance (Br. 20). The suggestion is inconsistent with the purpose of a Section 11(b)(1) proceeding which contemplates divestment and with the Commission's severance order in this case (A. 26).

after severance, the Commission's position as stated in its Findings and Opinion is not entirely clear. At one point it said, as indicated above, that Ebasco had failed "to consider employment of the combined billing procedures" (A. 14). At another point it said that Respondents had not "given any satisfactory reason why at least some form or forms of combined billing procedure could not be employed advantageously" (A. 13). Both statements are inconsistent with the record. Actually three qualified experts testified that the possibility of centralized billing was considered and rejected. The three witnesses testified respectively that centralized billing offered no realistic prospect for savings and would not be efficient, that it would not be important from a cost point of view, and that it would not result in any economy for the eight gas companies (A. 41-42, R. 569, 574, 735, 898-99, 901).

Whatever the Commission's meaning in its Findings and Opinion, the Commission there and again in its Brief quite inaccurately suggests that the item in question — customer billing — is a significant part of a broader function called customer accounting, which is one of the categories of cost analyzed in the Ebasco Report (A. 12-13, Br. 23).

The Findings and Opinion and the Brief both point out, correctly, that the personnel groupings under the customer *accounting* (as opposed to customer *billing*) category in the Ebasco Report represented $415,600 or approximately 40% of the estimated increase in costs (A. 12, Br. 23). The Commission paid no heed, however, to the abundant evidence in the record showing the small cost significance of customer billing as only a minor part of the overall customer accounting function (R. 527-32, 536, 552-54, 839-40, 857). The court below noted that while the Commission was purportedly criticizing a cost estimate of over $400,000, strictly it was speaking of a far smaller amount, perhaps

$60,000, only a portion of which could have been overstated. The court said:

> "This brings us to what was the added billing expense, and hence the amount of error attributed to the Ebasco report because of its failure to assert the saving which, in the Commission's opinion, could be effected by having centralized billing. The Commission concluded merely that Ebasco's failure caused the estimate to be 'overstated.' It did not concern itself with discovering even what were the total increased billing costs, let alone the portion (obviously not the whole) which might be saved if centralized billing were adopted. It did find that the increased billing costs estimated for two of the eight gas companies, billing singly after divestiture, was $34,700 for the two. These companies covered more than half of NEES' gas customers. On a pro rata basis this would make the total billing increase for all companies $60,000. While doubtless such a projection is not precise, it seems significant that the Commission was not sufficiently interested to make any at all. Under the circumstances we do not think it unreasonable for us to point out that while the Commission was purportedly criticizing a cost estimate of over $400,000, strictly it was speaking of perhaps $60,000, only a portion of which could have been overstated." (A. 43)

The Commission's second reason for rejection of the Ebasco Report was alleged "disparities" in the increased costs attributed to NEES' gas and electric operations in Northampton and Lynn, Massachusetts (A. 13-14), and particularly, as stressed by Petitioner's Brief, in Northampton (Br. 23-24).

The cited comparisons are invalid in numerous respects. The evidence clearly indicated that allocation of the treasury and accounting work load at Northampton is effected by the payroll offset method under which an allocation is preserved overall, but not as to individual employees or groups of employees performing part of the job (R. 439,860-64). The pro forma organization was tailored to fit the new

situation. It necessarily varied materially from the existing pattern; and personnel categories bearing the same label varied widely in their make-up. The comparisons of customer accounting costs, which are a part of the treasury and accounting function, are therefore meaningless. They reflect neither the existing allocation nor the corresponding pro forma expenses. The Commission's comparisons of total treasury costs are subject to the same infirmity; they cover different personnel. The Ebasco witness, attempting to supply the relevant personnel and figures at the hearing, was cut off on this point by counsel for the Commission's staff, who acknowledged that he was cutting the witness off, and never returned to the subject (R. 864-65).

Perhaps the most dramatic error of the Commission, however, is its use of larger pro forma gas company figures which would apply only if Northampton were run as a separate company after severance, not as part of an independent gas system (Res. 58A; R. 131, R. Vol. IV pp. 625-27). In this respect, the Commission relies on figures which by reason of its own decision under Section 2(a)(29)(B) it had already rejected (A. 3, 10 n. 13).

On these points the Commission, in its brief to the court below, argued that correction of the errors would have resulted in only "slight" modifications and "could not be expected to alter in any respect the Commission's conclutions." The court did not accept this argument. It indicated only that as compared with its rejection of the Commission's criticism relating to centralized billing it "might have more sympathy with some, but not all, of the Commission's criticism" based on alleged disparities (A. 43). Nor did it "necessarily criticize the Commission for its skepticism in the specifics" (A. 54). Nonetheless, the court wanted further and careful analysis and explanation by the Commission, for it found no contention that the alleged accounting disparities could "remove from the Ebasco $472,000 cost estimate many sizable items." (A. 43)

D. The Commission's expertise does not give it unlimited freedom to reject substantial, documented and uncontroverted expert evidence.

In its Brief, the Petitioner urges a new theory, not suggested in the Findings and Opinion, in justification of the Commission's rejection of the Ebasco Report: the Report, the Brief argues, is a "hypothetical aggregate" of value judgments or business decisions (Br. 21) and that being so, the Commission cannot "be limited in its power to reject estimates which it finds unconvincing and which rest upon as many imponderables as those presented by NEES, merely because cast in the form of expert testimony." (Br. 26-27)[10] As legal support for this thesis, the Petitioner relies on *Market St. Ry.* v. *Railroad Comm'n,* 324 U.S. 548 (1945), in which this Court held that the due process clause had not been violated when the California Railroad Commission, which was intimately familiar with local conditions and history, lowered certain San Francisco cable car and other fares on the basis of its own conclusions formed without the aid of expert opinions. 324 U.S. at 560.

The Commission does not occupy a position in any way comparable to that of the California Railroad Commission in *Market Street Railway.* The Holding Company Act is but one of six acts administered by the Commission, whose current duties under the Holding Company Act have been described by a recent Chairman as "vestigial".[11] The Com-

[10] The Brief suggests, too, that the impact of severance would be very different if operating revenues were to increase in the future (Br. 29). The speculation about future reventues is significant. With the gas companies operating on a small margin, a small decline in revenues would have an even more dramatic but significantly adverse effect.

[11] Cary, *Administrative Agencies and the Securities and Exchange Commission,* 29 LAW & CONTEMP. PROB. 653, 655 (1964). The other acts administered by the Commission are the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

mission is not familiar with local conditions applicable in this case and in reaching its decision, it has acted contrary to the views of the one participant in this case which does hold a position comparable to the California Railroad Commission's, namely the Massachusetts DPU, which regulates gas and electric utilities in Massachusetts, including the NEES companies. The DPU intervened before the Commission and, through its appearance, the testimony of its Chairman and its brief to the Commission, made clear that it concurred in the conclusions of the Ebasco Report and opposed divestiture as offering no advantages while imposing serious losses and creating the prospect of rate increases and the risk of dwindling sales (R. 41-42, 580-599). This expert analysis was also rejected by the Commission (A. 24-25).

There is another and perhaps even more significant difference between this case and *Market Street Railway*. There, as the Court noted, the Railroad Commission was "only receding, on experience, from steps it earlier had taken to advance the rate, which also had been regarded as experimental and as to which experience had disappointed expectations." 324 U.S. at 561. There is no such chance here for a second look and a change of heart. Once the divestment is ordered and carried out, the damage cannot be repaired, and the injury to consumers and investors cannot be restored. As the court below noted, the line of "serious impairment" is now drawn "close to the point of probable business failure." This "makes the holding company's burden of proof more difficult to carry but it also makes the risk more substantial that a divestment order based on erroneous findings will result in economic disaster." (A. 56)

The Commission's decision under Section 11(b)(1)(A) must always rest in part on estimates and calculations involving business judgment, since the test of "loss of substantial economies" necessarily requires a comparison of

operations under the existing organization with pro forma operations under a projected organization. The Respondents submitted a thorough, carefully documented and complete study prepared by recognized experts. Certainly the Commission may properly examine and question the conclusions of the experts who testified,[12] but neither the Commission's claim of expertise nor the difficulty of the decision can excuse the Findings and Opinion in this case which is seriously lacking in explanation, analysis and self-consistent findings based on the evidence. An agency's "*expertise* is not sufficient by itself. Findings supported by substantial evidence are required." *ICC* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961); 5 U.S.C. §§557, 706. In the present case, they are missing.

Much of Petitioner's Brief is devoted to an attempt to discredit severance studies in general, and the Ebasco Report in particular, and to justify substitution therefor of the Commission's general wisdom and expertise, on the ground that such studies involve business decisions and value judgments and that the use of precise figures produces an illusion of certainty which is misleading.

There are several answers to Petitioner's contention:

(i) The Ebasco Report is the kind of study the Commission routinely requires and relies on;

(ii) The Findings and Opinion does not even suggest any such "basic infirmity" as Petitioner now claims (Br. 21);

(iii) The Commission's decision in this case is actually and frankly based on comparison of figures derived from other severance studies; and

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[12] An expert's report may ordinarily be impeached only if his alleged errors are directly related to the other aspects of his testimony or are of so substantial a nature as to indicate carelessness or otherwise cast doubt on his qualifications. See Hoag v. Wright, 174 N.Y. 36, 43, 66 N.E. 579, 581 (1903).

(iv) The Respondents do not claim that the loss figures of the Report are exact but rather that they represent minimums and can safely be relied on as such. For obvious reasons, actual losses would undoubtedly be higher (R. 549, 555-56, 684-87).

If as the Petitioner argues, there is to be no limit on the Commission's freedom to reject expert testimony, the test under Section 11(b)(1)(A) will always rest in the sole discretion of the Commission, which will be free to reject all the evidence of projected losses and will remain completely immune from effective judicial review.[13] When a significant loss is proved conclusively, as it was here, the Commission cannot be allowed arbitrarily to reject the proof in its entirety. The court below properly did not attempt to supply the figures. It left that task to the Commission, and remanded the case for an adequate analysis and explanation by that agency.

2. THE COMMISSION'S HOLDING THAT LOSSES IN EXCESS OF $1,000,000 A YEAR, IN THE CIRCUMSTANCES OF THIS CASE, ARE NOT SUBSTANTIAL IS UNWARRANTED.

A. The divestment order is based on precedent rather than individual consideration.

In its Findings and Opinion the Commission held as an alternative basis of its decision that losses to the NEES

[13] The court below held that the burden of persuasion to which a holding company may properly be held is "a fair preponderance of the evidence", rather than the special higher standard imposed by the Commission of "clear and convincing evidence", which is traditionally imposed in civil cases involving such matters as fraud, and also in denaturalization and expatriation cases and, more recently, deportation proceedings (A. 9, 31 n. 4, 54 n. 3). See Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 285 n. 18 (1966); MCCORMACK, EVIDENCE §320 (1954). With the position now taken by the Petitioner in its Brief that severance studies are inherently unreliable (Br. 19-21) and are subject to unlimited rejection (Br. 26), the Commission's special "clear and convincing evidence" standard can apparently never be met.

gas companies of $1,098,600 annually resulting from severance would not be "substantial" within the meaning of Section 11(b)(1)(A) of the Holding Company Act. The only reason given for this conclusion was that, expressed as ratios to the gas system's operating revenues, operating revenue deductions (excluding federal income taxes), gross income and net income before federal income taxes, the estimated losses for the NEES gas companies were "lower or not significantly higher than" similar ratios applicable to certain gas and electric properties ordered divested in prior cases (A. 16).

The court below found this summary treatment of the severance losses an entirely inadequate disposition. The ratios used by the Commission, the court said, have little relevance to the questions posed by the "serious impairment" test approved by this Court (A. 57, 58). Moreover, the figures drawn from the other cases were not in the record and were not dispositive of the issue in those cases (A. 58, 62-63). Finally, the court noted, the comparability of the circumstances of the other utilities cited — such matters as their market position, their rates of return and profitability — was in no way examined or established (A. 57-58).

As to the limited relevance of the ratios selected by the Commission, the court below noted that the "serious impairment" test now posed by this Court requires a careful examination of the effect of the losses on the particular companies involved, "in terms of the potential harm to the investor and consumer" (A. 57). The Commission's loss ratios do not answer the test, because the percentages have little meaning unless the rates of return are known and the likelihood of rate increases and financing problems can be assessed (A. 57-59). The Commission's ratios "are significant only as they affect the investment structure of the companies in the particular case, and different companies may be compared only on the assumption that both operate

at the same level." (A. 57)[14] In its Findings and Opinion the Commission in no way examined these critical economic questions.

As to the immateriality of the figures taken by the Commission from prior cases, the court noted that the "comparison-of-ratios test" was first used by the Commission in *Philadelphia Co.*, 28 S.E.C. 35 (1948), as "nothing more than the normal decisional technique of referring to and comparing the facts in prior decisions as a guide", not for the purpose of disposition as stated by the Commission; and that the figures selected by the Commission for comparison in *Philadelphia* were "either ignored or considered mere makeweights in the earlier cases, except in a few where the percentages were so small as to demonstrate that the claimed losses were *de minimis.*" (A. 58 n. 6)

The court carefully elaborated this analysis in an appendix attached to its opinion (A. 62-63), and further cautioned the Commission that the court "must disapprove entirely of the practice adopted by the Commission after 1948 of comparing the ratios before it with similar ratios derived, not from the opinions in previous cases, but from the papers and records in its files." (A. 62) As a supplement to the court's appendix, Respondents are attaching an appendix to this brief (Appendix B) analyzing in detail the losses cited in divestment cases specified by the Commission (including *Philadelphia*). It can be seen from this Appendix that five of the seven

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[14] For these reasons, the Commission's comparisons of operating ratios (operating revenue deductions as a percentage of operating revenue) are equally irrelevant since as the court noted, "a business may operate relatively efficiently, yet at a level too low to attract investors." (A. 58) In general, operating ratios are used by financial analysts and regulatory bodies in the utility field not as a guide to rate making but to afford "a measure for determining the efficiency with which the enterprise is conducted and while its value is greater in comparing the year to year trend it has a limited use in comparing very similar enterprises." MOODY'S PUBLIC UTILITY MANUAL, p. ix (1967).

divestment orders cited by the Commission in the Appendix to its Findings and Opinion were based not on a finding that the claimed loss of economies was not substantial, but on the fact that the Commission had not believed the estimates or that the estimates failed to show the amount of lost economies. The other two, possibly relevant, involved dramatically smaller loss ratios.

The third defect in the Commission's comparison-of-ratios test, as specified by the court, was the absence of any basis of comparability between the other utilities divested and the gas companies involved here. A glance at the other cases (see the Commission's Appendix A. 28, or this brief's Appendix B) shows that the Commission was using, for example, ratios involving a gas company in Virginia in 1940, a Pennsylvania electric company in 1949, and a Louisiana gas company in 1954. The relevance of these is inherently doubtful and in any event was in no way explained by the Commission. The court below summed it up as follows:

> "We do not think that the Commission's obligation, which is at the root of the respect to which its expertise is entitled, is satisfied by the invocation of largely irrelevant ratios or of other data concerning other companies, at other times, in other areas, facing possibly different conditions." (A. 59)[15]

The court below was equally dissatisfied with the Commission's cursory and inadequate comparison of NEES with other companies in Massachusetts, and with the Com-

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[15] The Petitioner in its Brief inaccurately states that "the court . . . rejected the Commission's comparison of ratios in other cases where divestment was ordered, because it assumed that NEES's situation was unique", and that acting "on the assumption that it was dealing with certain and harsh consequences to investors" it thought that the Respondents "had made out a special case for leniency" (Br. 30). The court's actual reasons for rejecting the comparison-of-ratios test are summarized above and are amply stated in its opinion (A. 57-59).

mission's reliance on their supposed successful operation as a reason for believing that the NEES gas companies would also be able to perform satisfactorily after severance (A. 17-18, A. 56-58). The Commission assumed with no evidence, that the other companies in Massachusetts used for comparison (i) were independent, (ii) were subject to the same competitive conditions, (iii) were able to compete effectively with oil and (iv) were capable of economical operation.[16] The validity of every one of these assumptions was essential to the validity of the comparisons. Yet there is no evidence in the record to support any of them, and in fact, there is clear and explicit exidence controverting each. These so-called "independents" involve a variety of affiliations, connections, combinations of gas and electricity and other arrangements.[17] Their franchise areas are materially different in significant ways (R. 509, 591, 937-39). Some of them are experiencing economic problems and the Chairman of the DPU testified that there had been one recent bankruptcy (R. 591).

B. The Commission has failed to examine the prospective effect of separation.

Losses of $1,098,600 annually would, unless rates are increased, reduce the net income of the NEES gas companies

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[16] The Petitioner's Brief asserts that the NEES gas system is the second largest in the New England region (Br. 9) and stresses (more narrowly) that the Commission found it the second largest in Massachusetts (Br. 30-31). As the court below noted, however, "The record here is silent on the economic health of the largest system." (A. 57).

[17] The Commission introduced limited evidence at the hearing concerning the numbers of customers, sales and revenues of nine of

before federal income taxes by 30% and would reduce the rate of return on invested capital to 4.1% (A. 57-58). There was voluminous evidence as to the adverse economic effect of a rate increase, the absence of any offsetting financial benefits to be anticipated from independent operation, and the handicaps peculiar to the franchise areas under which the NEES gas companies operate (R. 509, 696, 722-24, 739, 756-58, 937-39). On the basis of this evidence and by the application of its general experience and expertise, the Commission could have formed a reasonable estimate of the effect of the losses on the economic health of the system, applying the tests suggested by the court below or other tests selected by the Commission.[18] The fact that resolving

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the twelve Massachusetts companies (Div. Ex. 4A-4D; R. 946, R. 1447-52). Of the nine gas companies so selected by the Commission, only three are independent; and the record shows that the Division was aware that at least some of these companies were not "independent" (R. 1246; Res. Ex. 57; R. 85, 1310; MOODY'S PUBLIC UTILITY MANUAL, pp. 68, 71, 72, 80, 103, 127, 138, 278, 858, 1278, 1284 (1959); R. 177). On direct examination the Staff's witness who introduced this evidence explained why two of the nine companies were not considered comparable (R. 944-45). On cross examination the witness admitted that he did not know whether the remaining seven non-affiliated gas companies followed the same practice of reporting domestic gas sales as did NEES, that other factors would have to be considered to determine the value of the comparisons, that no comparisons of insurance cost per customer had been made, and that though his figures did not reflect the percentage of the total which was represented by interruptible sales, that percentage would be a significant factor in evaluating a company's MCF per customer record (R. 1241-47). The Commission itself in prior cases has recognized the marginal value of generalized comparisons of this kind. See North American Co., 18 S.E.C. 459, 464-65, 611, 617 n. 10 (1945); Northern States Power Co., 36 S.E.C. 1, 9 (1954).

[18] The court below expressly left to the Commission the selection of relevant factors to be considered (A. 59). It in no way required the Commission "to make a specific determination as to the system's future rate of return," as implied by the Petitioner's second specific question (Br. 3).

the question on the basis of expert testimony may be less convenient and result in some delay, as suggested in Petitioner's Brief (Br. 34), does not relieve the Commission of this duty.

3. THE COURT BELOW CORRECTLY INTERPRETED THE WEIGHT THIS COURT ATTRIBUTED TO THE ASSUMED BENEFITS OF SEPARATE OPERATION.

A. The claim that the assumed general benefits of competition can be used a second time in testing substantiality is novel and its validity has not been decided by this Court.

The Petitioner now takes the position that the assumed benefits of independence may be taken into account first in the formulation of the standard of substantiality and then again in meeting that standard, and undertakes to find support for that position in the prior decision of this Court. Petitioner's Brief goes so far as to claim that this issue of double use was squarely presented and squarely decided by this Court at that time (Br. 35 n. 15). This is not borne out by the record and is contrary to the position previously taken by the Petitioner.

The only question presented to this Court when it first considered this case was, as set forth in the Petition and both briefs, the *meaning* of the statutory phrase "loss of substantial economies," — how the phrase was to be interpreted and nothing more. The Petitioner was then urging a most stringent test, not within the normal meaning of the words, on the ground that the policy of the Holding Company Act favoring free competition could not be given effect in any other way because of the difficulty of placing a dollar value on the benefit. It stated its position in its brief (p. 38) thus:

"The Commission's interpretation of 'substantial economies,' however, avoids these difficulties and permits the

agency to give effect in a meaningful way to the very real, although immeasurable, substantial competitive advantages that result from elimination of common holding company control of gas and electric systems without being required to perform the impossible task of making dollar predictions about an issue that is incapable of such precise definition."

There was not even a suggestion of further use of this factor. Reflecting it in the test of substantiality to produce a "most stringent standard" was apparently considered to be wholly adequate to effect the policy of the Holding Company Act.

Similarly, in this Court's consideration of the case, it is reasonable to assume that the Court thought of the policy of the Holding Company Act and the probable benefits of competition only as they bore on the question before it, namely, the interpretation of the statutory term.

An examination of the opinion confirms this assumption. After referring to the legislative history as suggesting a more stringent test than the lower court's business judgment test, the opinion dealt with the impact of "the theme of elimination of 'restraint of free and independent competition'." *SEC* v. *New England Elec. Sys.*, 384 U.S. 176, 183 (1966). In this connection it commented on the difficulty of forecasting competitive advantages and the necessity of leaving this to the Commission's expertise, and concluded that the Commission's construction of the statutory phrase in exercise of its expertise was within the permissible range. 384 U.S. at 184-85.

In this context the Court's comments were obviously intended to relate only to the question with which the Court was dealing, the meaning of "substantial economies". The Court was simply defining the test, not considering how it could be satisfied.

B. Authorization to give unrestricted effect to the assumed benefits of competition would provide the Commission *carte blanche* without any opportunity for court review.

Petitioner's Brief points out that once the Commission's right to give independent weight to the benefits of competition (that is, to offset them against proven losses without identifying and evaluating specific benefits) is recognized, the Commission's conclusion that divestment would not entail the loss of substantial economies becomes unassailable (Br. 36-37). This would always be so, and therein lies the danger.

If loss of economies, otherwise meeting the test, can be offset by a general reference to the benefits of free competition without any determination of the reality or approximate value of those benefits, or the extent to which they offset proven losses, then the Commission has absolute power to order divestment in any case it desires, and the right of judicial review which the Holding Company Act purports to give becomes, as a practical matter, a nullity. Any amount of carefully prepared factual evidence and expert opinion, even if uncontroverted, goes for naught. Whatever the amount of the lost economies, the Commission can brush them aside with the simple statement that they are offset by the benefits of competition. This is a prerogative which the Petitioner now seeks (Br. 17), but this result could hardly have been intended by the Congress. A more reasonable application of the statute must be found.

Admittedly the dollar value of the competitive advantages to be gained by separation is difficult to forecast (A. 60). Yet the loss of economies which determines retainability of an additional system has to be expressed in dollars, and any item entering into the computation of the net loss, or used as a set-off against proven loss, must of necessity be similarly expressed.

In the present case there is ample uncontradicted evidence that no offsetting advantages could be expected from severance. There is also ample uncontradicted evidence to show why an increase in expense of the magnitude involved would be peculiarly important and serious for these gas companies. There appears to be no previous case in which the Commission has felt free to draw inferences contrary to evidence of this kind without specific contrary evidence as a basis for such inferences.

C. The lower court's formula is a reasonable answer.

The formula adopted by the lower court in carrying out this Court's mandate is sound and consistent with this Court's decision. The general policy of the Holding Company Act is given effect without specific evaluation by establishing a most stringent standard of "serious impairment," thus permitting construction of the phrase "substantial economies" in a way which is not within the normal meaning of the words used and thereby giving significant weight to the policy.

Then if it is found that separate operation can be expected actually to reduce the net losses either by increasing income or by reducing expenses in an amount that can be reasonably predicted, whether because suppression of competition will be ended or for some other identifiable reason, the approximate amount of increase in income or reduction of expenses can be offset against the loss of economies. On this basis the benefit of competition becomes one of the items in the calculation of the net loss of economies.

In a case such as the instant one, where any actual benefits from separation are highly speculative and the evidence indicates that there will be none, giving any further effect

to purely theoretical benefits than this Court has already approved in defining the standard appears unnecessary and unwarranted.

4. THE COURT BELOW DID NOT ERR IN REMANDING THE CASE TO THE COMMISSION FOR FURTHER PROCEEDINGS.

A. On review of the entire record, the court below found serious errors and deficiencies.

In determining whether the Commission's Findings and Opinion meet the standards generally imposed on administrative agencies, that is, whether the findings are supported by substantial evidence in the record as a whole, whether the ultimate conclusions are based on adequate subsidiary findings and articulated reasoning, and whether the Findings and Opinion represent a careful and consistent application of expertise, the court below found numerous and serious deficiencies which not only warranted but indeed required a remand of the case to the Commission.

These deficiencies and errors in the Findings and Opinion included the following:

(i) With no explanation the Commission, for purposes of Section 2(a)(29)(B) of the Act, relied on the Ebasco Report while, for purposes of Section 11, it rejected the same Report in its entirety as unreliable (A. 3, 14, 24, 38 n. 8).

(ii) The Commission held that no severance losses had been proved, whereas based on unchallenged evidence and the whole record there could be no doubt that significant losses were conclusively proved (A. 14, 24, 43-44, 54).

(iii) The Commission's analysis of increased accounting costs resulting from severance rested on demonstrably false assumptions and inaccurate figures which could have resulted only from a failure on the part of the Commission to examine the record carefully and thoroughly. (See pp. 17-19 above.)

(iv) In holding the projected loss of economies insubstantial, the Commission relied on a comparison with ratios in prior cases which were based on erroneous figures and which had no demonstrated relevance or comparability to this case (A. 16, 28, 57-58, 58 n.6, 62-63 and Appendix B to this brief).

(v) The Commission in no way attempted to analyze the effects of severance on the NEES gas companies to determine whether their operations would be seriously impaired (A. 54-59).

(vi) The Commission assumed that other Massachusetts gas companies are independent, operate successfully and earn a fair rate of return, despite the uncontroverted evidence in the record that they are not all independent, that all are operating on a small margin and that there has already been a bankruptcy. (See pp. 27-28 above; A. 57-58.)

(vii) The Commission assumed the comparability of other gas companies to the NEES companies on no basis in the record except that they are in the same state (A. 56-58).

B. The determination of the court below should not be disturbed in the absence of an affirmative showing that it was clearly wrong.

Congress has placed with the Courts of Appeals the duty to review administrative agency decisions and to determine whether they are supported by substantial evidence and otherwise comply with applicable legal requirements. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-91 (1951); *FTC* v. *Standard Oil Co.*, 335 U.S. 396, 398-401 (1958); 5 U.S.C. §706, 80 Stat. 393; Section 24(a) of the Holding Company Act. The court below in carry-

ing out this duty has required that the findings of the Commission be reasonably consistent with the substantial evidence in the record as a whole, as applied to the statutory standard laid down by this Court (A. 54, 42-45), and that they be sufficiently articulated and particularized to enable the reviewing court to determine whether and how the Commission has applied its expertise. See *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 654 (1954). Having found that the Commission's Findings and Opinion are inconsistent with conclusive evidence in the record, the court has properly remanded the case for further examination by the Commission.

In general, the Commission argues that its expertise is a sufficient answer but, as this Court has said, "*expertise* is not sufficient by itself." *ICC* v. *J-T Transport Co.,* 368 U.S. 81, 93 (1961). "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion)." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167 (1962).

A clear understanding of the deficiencies in the Commission's Findings and Opinion necessarily depends on a review of the entire record — the 1,200 pages of testimony and the four volumes of exhibits, including in particular the three volumes of the Ebasco Report. The court below has undertaken this heavy task twice, and the five judges who have participated have all reached the conclusion that the Commission has not performed its job in this case. This Court ought not to be obliged to examine and evaluate the entire record, and yet in the end that is what it must do to satisfy the requests of the Petitioner. This Court's power to review the correctness of the application of the standard of substantial evidence in light of the entire

record "ought seldom to be called into action." *Universal Camera Corp.* v. *NLRB, supra* at 490. The Court "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied", *id.* at 491, and the Court, if it does review, will do "no more on the issue of insubstantiality than decide [whether] the Court of Appeals has made a 'fair assessment' of the record." *FTC* v. *Standard Oil Co., supra* at 401; See *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951). Respondents submit that the Court of Appeals has made a demonstrably fair assessment of the entire record, and that its opinion and order are amply supported and justified, and indeed required in light of the record and the deficiencies in the Findings and Opinion.

CONCLUSION

For the reasons stated, the judgment of the Court below should be affirmed.

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